

A Majlis Perbandaran Melaka Bandaraya Bersejarah v Yau Jiok HuaHIGH COURT (MELAKA) — ORIGINATING MOTION NO MT1–25–13
TAHUN 2004**B** LOW HOP BING J
18 JANUARY 2006**C** *Civil Procedure — Contempt of court — Breach of court order — Imprisonment or fine
— No statutory limit to the imposition of a fine — Consideration in the assessment of the
appropriate fine*

D In a Melaka High Court civil suit (the main suit), the respondent appeared as solicitor and counsel for the judgment creditor in garnishee proceedings against the applicant as garnishee. The judgment creditor has appealed to judge in chambers against the decision of the deputy registrar who dismissed the judgment creditor's application to make absolute the garnishee notice nisi. On 23 November 1995, Suriyadi JC (now J) allowed the judgment creditor's appeal, and ordered the applicant to pay to the judgment creditor the sum of RM309,133.45 ('the money').

E On the same date, the applicant's solicitors made an oral application for stay of execution as the applicant wished to appeal against that decision. The learned judge granted the stay on condition that the applicant pays the money to the respondent as judgment creditor's solicitor subject to an undertaking to refund the money to the applicant in the event the applicant's appeal was allowed ('the stay order').

F The applicant effected payment of the money to the respondent. On 11 March 2002, the Court of Appeal allowed the applicant's appeal ('the CA order'). This CA order has crystallized Suriyadi J's order requiring the respondent to refund the money to the applicant. The respondent filed an application in the Federal Court for leave to appeal against the CA order. On 31 March 2003, the Federal Court dismissed with costs the judgment creditor's said application. Despite repeated reminders from the

G applicant's solicitors, the respondent has failed, refused and/or neglected to comply with the stay order and the CA order, conjunctively requiring the respondent to refund the money to the applicant. On 16 October 2003, pursuant to the applicant's application in the main suit, in the presence of both the applicant's counsel and the respondent who appeared for the judgment creditor, an order in terms thereof

H ('the 2003 order') was made whereby the respondent was required to comply with the stay order and the CA order by paying to the applicant the money held by the respondent as stakeholder on the undertaking to refund the money to the applicant in the event the applicant's appeal succeeds. An originating motion was filed by the applicant pursuant to O 52 of the Rules of the High Court 1980 for an order,

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inter alia, that the respondent be committed to prison (until further order) for contempt of court.

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Held:

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- (1) There was no doubt whatsoever that the motion and the statement had set out the contempt specifically alleged against the respondent and had specified, with sufficient particularity, the precise nature of the order with which the respondent had to comply, ie payment of the money by him to the applicant within the time frame stated therein, and that the respondent knew exactly what the alleged contempt was in order to enable him to meet the allegations against him and to prepare his defence (see para 66).

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- (2) Apart from considering the respondent's submissions on their merits, all the issues and points raised by the respondent were highly technical. Rules of court contain vehicles for the purposes of obtaining necessary prayers according to the rights and obligations of the parties under the law. These rules should not be rendered ineffective by highly technical objections. In *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 at p 5, where the issue raised for the defendant therein was highly technical in nature which has not occasioned a substantial miscarriage of justice, O 1A was invoked (see paras 76–77).

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- (3) It needs to be observed that art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 confer upon our Federal Court, Court of Appeal and High Courts, the jurisdiction to punish any contempt of itself. Our superior courts have theoretically unlimited jurisdiction to mete out any sentence for contempt of court (see para 90).

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- (4) Under art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964, there is no statutory limit to the imposition of a fine. The culpability of the respondent here clearly calls for the imposition of a substantial fine. In assessing the appropriate fine, the damage done to public interest, in addition to the seriousness of the contempt must be taken into account (see para 93–94). The court therefore imposed a fine of RM75,000 or 100 days in default. As the contempt is of a continuous nature, and so long as the contempt has not been purged by the contemnor, it continues unabated everyday. For that, a daily fine of RM750 was imposed, to be paid from day to day, until the contemnor purges the contempt, ie by paying the money to the applicant pursuant to the 2003 order. For the daily fine, the court impose a day's imprisonment in default thereof (see paras 97–98).

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[Bahasa Malaysia summary]

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Di satu tindakan sivil di Mahkamah Tinggi Melaka (tindakan utama), responden bertindak sebagai peguamcara dan peguambela untuk pemiutang penghakiman di satu prosiding garnisan terhadap pemohon sebagai penggarnis. Pemiutang penghakiman telah merayu kepada hakim dalam kamar terhadap keputusan timbalan pendaftar yang menolak permohonan pemiutang penghakiman untuk menjadikan

- A notis garnisan mutlak. Pada 23 November 1995 Suriyadi PK (kini H) telah memerintahkan pemohon membayar kepada pemiutang penghakiman jumlah RM309,133.45 ('wang tersebut'). Pada tarikh yang sama, peguamcara pemohon membuat satu permohonan lisan untuk satu penggantungan pelaksanaan keputusannya oleh kerana pemohon ingin merayu terhadap keputusan tersebut.
- B Hakim yang bijaksana telah membenarkan penggantungan pelaksanaan di atas syarat bahawa pemohon membayar wang tersebut kepada responden sebagai peguamcara pemiutang penghakiman di atas satu akujanji untuk membayar balik wang tersebut kepada pemohon sekiranya rayuan pemohon dibenarkan ('perintah penggantungan pelaksanaan'). Pemohon membuat bayaran wang tersebut kepada responden. Pada 11 Mac 2002, Mahkamah Rayuan membenarkan rayuan pemohon ('perintah MR'). Perintah MR ini menghablurkan perintah Suriyadi H yang memerintahkan responden membayar balik wang tersebut kepada pemohon. Responden telah memfailkan satu permohonan ke Mahkamah Persekutuan untuk kebenaran merayu terhadap perintah MR. Pada 31 Mac 2003, Mahkamah Persekutuan menolak dengan kos permohonan pemiutang penghakiman. Walaupun beberapa kali peringatan daripada peguamcara pemohon dihantar, responden telah gagal, enggan dan/atau ingkar menurut dengan perintah penggantungan pelaksanaan dan perintah MR, yang mengehendaki responden membayar balik wang tersebut kepada pemohon. Pada 16 Oktober 2003, dalam melaksanakan permohonan pemohon di tindakan utama, dalam kehadiran kedua-dua peguamcara pemohon dan responden yang hadir bagi pihak pemiutang penghakiman, satu perintah seperti yang dipohon ('perintah 2003') diberikan di mana responden dikehendaki menurut perintah penggantungan pelaksanaan dan perintah MR dengan membayar kepada pemohon wang tersebut yang dipegang oleh responden sebagai pemegang amanah atas satu akujanji untuk memulangkan wang tersebut kepada pemohon sekiranya rayuan pemohon dibenarkan. Satu usul semula telah difailkan oleh pemohon mengikut A 52 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk satu perintah, antara yang lain, bahawa responden dimasukkan ke penjara (sehingga perintah selanjutnya) untuk penghinaan mahkamah.

G Diputuskan:

- (1) Tiada keraguan langsung bahawa usul dan kenyataan telah membentangkan satu penghinaan dengan pengataan secara spesifik terhadap responden dan telah nyatakan secara spesifik, dengan butir-butir yang mencukupi, sifat khusus perintah di mana responden harus menurut iaitu pembayaran wang tersebut olehnya kepada pemohon dalam masa yang dinyatakan di situ, dan responden faham sebenarnya apa pengataan penghinaan yang dikatakan itu untuk membolehkannya menghadapi pengataan terhadapnya dan menyediakan pembelaannya (lihat perenggan 66).
- (2) Selain daripada menimbangkan hujahan responden atas merit, segala isu-isu dan hujah-hujah yang dibangkitkan oleh responden adalah terlampau teknikal. Kaedah-kaedah mahkamah diperalatkan untuk memperoleh permohonan-permohonan yang perlu, mengikut hak-hak dan obligasi-obligasi pihak-pihak di bawah undang-undang. Kaedah-kaedah ini tidak patut dijadikan tidak berkesan atas sebab-sebab bantahan yang terlampau teknikal. Dalam kes *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7

- CLJ 1 di ms 5, di mana isu yang dibangkitkan untuk defendan adalah bersifat terlampau teknikal dan tidak menyebabkan ketidakadilan yang substantif, A 1A digunakan (lihat perenggan 76–77). **A**
- (3) Ia harus diperhatikan bahawa perkara 126 Perlembagaan Persekutuan dan s 13 Akta Kehakiman Mahkamah 1964 memberikan Mahkamah Persekutuan kami, Mahkamah Rayuan dan Mahkamah-mahkamah Tinggi, bidang kuasa menghukum sebarang penghinaan dengan sendirinya. Mahkamah-mahkamah tertinggi kami telah secara teori mempunyai bidang kuasa yang tidak terhad untuk memberikan hukuman untuk penghinaan mahkamah (lihat perenggan 90). **B**
- (4) Di bawah perkara 126 Perlembagaan Persekutuan dan s 13 Akta Kehakiman Mahkamah 1964, tidak ada batasan statutori untuk pengenaan denda. Kebersalahan responden jelasnya memerlukan pengenaan denda yang tinggi. Dalam mengenakan denda yang sewajarnya, kerosakan kepada kepentingan awam, selain daripada keseriusan penghinaan tersebut perlu diambil kira (lihat perenggan 93–94). Dengan ini, mahkamah mengenakan denda sebanyak RM75,000 atau pemenjaraan 100 hari jika ingkar bayaran. Oleh kerana penghinaan adalah bersifat berterusan, dan selagi penghinaan belum dibersihkan oleh penghina, ia berterusan setiap hari. Untuk itu, denda harian sebanyak RM750 dikenakan, untuk dibayar hari ke hari, sehingga penghina membersihkan penghinaan iaitu dengan membayar wang tersebut kepada pemohon menurut perintah 2003. Untuk denda harian, mahkamah mengenakan pemenjaraan sehari jika ingkar bayaran (lihat perenggan 97–98).] **C**
- D**
- E**

Notes

For cases on breach of court order, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1543–1561. **F**

Cases referred to

- A-G v Newspaper Publishing plc & Ors* [1988] Ch 333 (refd)
- Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd, Re* [1966] 2 All ER 849 **G**
- Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 (refd)
- Bramblevale Ltd, Re* [1970] Ch 128 (refd)
- Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1 (refd)
- Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 249 (refd)
- Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 (refd)
- Chung Onn v Wee Tian Peng* [1996] 5 MLJ 521 (refd) **H**
- Classic One Video Distributors Sdn Bhd v Chanan Singh all Sher Singh* [1997] 5 MLJ 209 (refd)
- Dean v Dean* [1978] 1 FLR 517 (refd)
- Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors* [2003] 6 MLJ 19 (refd)
- Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332 (refd) **I**
- Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 (refd)
- Megnaway Enterprise Sdn Bhd v Soon Lian Hock* [2003] 5 CLJ 103 (refd)
- Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329 (refd)

- A** *Nicholls v Nicholls* [1997] 147 NLJ 61 (refd)
Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd [1964] Ch 195 (refd)
Polygram Records Sdn Bhd v Phua Tai Eng [1986] 2 MLJ 87 (refd)
R v Immigration Tribunal Ex Parte Jeyanthan [1999] 3 All ER 231 (refd)
- B** *R v Thomson Newspapers Ltd & Ors* [1968] 1 All ER 268 (refd)
Syarikat Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112 (refd)
Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126 (refd)
Terrance Simon Marbeck v Kerajaan Malaysia [2003] 6 CLJ 120 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor [1995] 3 MLJ 549 (refd)
- C** **Legislation referred to**
Courts of Judicature Act 1964 s 13
Federal Constitution art 126
Rules of the High Court 1980 O 1A, O 2 r 3, O 42 r 8(1), (3), (4), O 45 rr 5, 7(2), (6), O 52 r 2
- D** *Respondent in person (Yau Jiok Hua & Co).*
Abdul Majid Md Yusof (Pakhruddin & Partners) for the applicant.

Low Hop Bing J:**E** APPLICATION

- F** [1] This originating motion in encl (10) ('the motion') was filed by the applicant pursuant to O 52 of the Rules of the High Court 1980 for an order, inter alia, that the respondent be committed to prison (until further order) for contempt of court.

[2] As the applicant was at the material time also the garnishee, I shall refer to these two capacities interchangeably in this judgment.

- G** [3] For brevity and convenience, a reference to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980, unless otherwise stated.

FACTUAL BACKGROUND

- H** [4] At the material time, the applicant was the Melaka Historical Municipal Council, while the respondent was and still is an advocate and solicitor practising as a sole proprietor under the name and style of Yau Jiok Hua & Co having an address for service at No 132, Jalan Tengker, 75200 Melaka ('the respondent's address for service').

- I** [5] In Melaka High Court Civil Suit No 22-113-1992 ('the main suit'), the respondent appeared as solicitor and counsel for the judgment creditor First Consolidated Sdn Bhd ('the judgment creditor') in garnishee proceedings against the applicant as garnishee. There has never been any break in the respondent's retainer in the main suit for the past 14 years.

[6] The judgment creditor has appealed to Judge in chambers against the decision of the deputy registrar who had on 11 April 1995 dismissed the judgment creditor's application to make absolute the garnishee notice nisi. **A**

[7] On 23 November 1995, Suriyadi JC (now J) allowed the judgment creditor's appeal, and ordered the applicant to pay to the judgment creditor the sum of RM309,133.45 ('the money'). **B**

[8] On the same date, the applicant's solicitors made an oral application for stay of execution as the applicant wished to appeal against that decision. In the presence of the respective counsel therein, including the respondent, the learned judge granted the stay on condition that the applicant pay the money to the respondent as judgment creditor's solicitor subject to an undertaking to refund the money to the applicant in the event the applicant's appeal was allowed ('the stay order'). His Lordship's notes of proceedings read as follows: **C**

I will allow the stay of execution on condition the sum involved is deposited with the Garnishor's solicitor upon undertaking to refund the garnishee in the event the appeal succeeds. **D**

[9] The 'Garnishor solicitor' is the respondent. **E**

[10] On 29 November 1995, the applicant filed the appeal in the Court of Appeal vide Civil Appeal No M-03-34-1995.

[11] Pursuant to the stay order, the applicant had on 3 January 1996 through solicitors Messrs Adillah A Nordin effected payment of the money to the respondent. **F**

[12] For brevity and convenience, I shall refer to the applicant's then and present solicitors simply as 'the applicant's solicitors'.

[13] On 11 March 2002, the Court of Appeal allowed the applicant's appeal ('the CA order'). **G**

[14] This CA order has crystallized Suriyadi J's order requiring the respondent to refund the money to the applicant.

[15] Upon the judgment creditor's instructions, the respondent had on 10 April 2002 filed an application in the Federal Court for leave to appeal against the CA order. **H**

[16] Meanwhile, vide letter dated 2 January 2003 addressed to the respondent at his address for service, the applicant's solicitors served a certified true copy of the sealed CA order on the respondent. That letter referred to the applicant's solicitors' letter dated 7 November 2002 and the stay order, and demanded the refund of the money by the respondent to the applicant. There was an acknowledgment of receipt by the respondent of the letter and the enclosures by affixing the rubber stamp, **I**

- A** complete with telephone and facsimile numbers and a manual signature, date and time of receipt, ie 3 January 2003, 3.40pm.
- [17] On 31 March 2003, the Federal Court had vide Civil Application No 08-27-2002 (M) dismissed with costs the judgment creditor's said application.
- B** [18] Despite repeated reminders from the applicant's solicitors, the respondent has failed, refused and/or neglected to comply with the stay order and the CA order, conjunctively requiring the respondent to refund the money to the applicant.
- C** [19] On 16 October 2003, pursuant to the applicant's application in encl (56) in the main suit, in the presence of both the applicant's counsel and the respondent who appeared for the judgment creditor, I delivered my written judgment in full and made an order in terms thereof ('the 2003 order').
- D** [20] Subsequently, applicant's solicitors submitted a copy of the draft order for approval by the respondent as judgment creditor's solicitor. The respondent had returned the draft order with his signed consent and approval without any amendment. The approved draft order was thereafter sealed by the registrar of this court on 5 November 2003.
- E** [21] The applicant's solicitors vide letter dated 27 December 2003 served a sealed copy of the 2003 order on the respondent who had acknowledged receipt thereof on the same date. That letter also demanded payment of the money by the respondent to the applicant's solicitors within seven days of the date of service thereof.
- F** [22] Vide two AR registered letters both dated 11 May 2004, the applicant's solicitors demanded the refund, inter alia, of the money by the respondent to the applicant within 14 days from the date thereof.
- G** [23] This was followed by two more letters both dated 19 July 2004 served by the applicant's solicitors on the respondent demanding payment by the respondent to the applicant of, inter alia, the money. The respondent had on 20 July 2004 acknowledged receipt thereof.
- H** [24] The affidavit of Miss Adillah Ahmad Nordin the applicant's then counsel having conduct of the main suit and this matter averred that:
- I** (1) The 2003 order has been served on the respondent personally vide letter dated 27 December 2003 addressed to Tetuan Yau Jiok Hua & Co at the respondent's address for service, the receipt of which was acknowledged on the same date.
- (2) The CA order has been served on the respondent personally vide letter dated 2 January 2003 addressed to Tetuan Yau Jiok Hua & Co at the respondent's address for service, the receipt of which has been acknowledged on 3 January 2003.

- (3) The 2003 order dated 16 October 2003 was made pursuant to the applicant's summons in chambers in encl (56) and was filed by the applicant's solicitors on the basis of the draft order which has been approved by the respondent without any amendment. **A**
- (4) The CA order has specifically referred to the main suit wherein the stay order stated that the money must be refunded by the respondent to the applicant. **B**
- (5) The respondent was personally present in court on 23 November 1995 when the stay order was pronounced by Suriyadi JC (now J).

[25] Despite repeated reminders by applicant's solicitors, the respondent has failed, refused and/or neglected to refund the money. That has caused the applicant to instruct its solicitors to commence committal proceedings against the respondent. **C**

[26] On 8 September 2004, the applicant's solicitors filed an ex parte originating motion for leave under O 52 r 2. Leave was granted by me on 13 January 2005. Subsequently, the applicant filed the substantive motion in encl (10). **D**

[27] The respondent's two affidavits in reply averred in essence that:

1. He has never at any time been personally served with the 2003 order, the stay order and the CA order (collectively 'the three orders');
2. The 2003 order did not contain the terms of the order granted by me; **E**
3. The CA order has made no reference to the money which is the subject matter of this motion;
4. The applicant as garnishee was ordered but has failed to pay the money forthwith to the judgment creditor under the stay order;
5. On 3 January 1996, pursuant to O 42 r 8(1) the applicant's solicitors sent a draft order to the respondent for approval, which the respondent approved with amendment so as to reflect the terms of the stay order; **F**
6. On 6 January 1996, the respondent returned the approved amended draft order to the applicant's solicitors;
7. Vide letter dated 3 January 1996, the applicant's solicitors effected payment of the money by way of cheque No BBMB 036705 to the respondent as payee; **G**
8. The applicant has failed to effect service of the summons in chambers in encl (56) on the respondent personally, as a result of which he was not given the opportunity to oppose;
9. He has approved the draft 2003 order without any amendment as he had subscribed to the full belief that the garnishee's solicitor has prepared the draft order in the terms as allowed by me; **H**
10. He only became aware that the sealed 2003 order did not contain the terms of the 2003 order after he has referred to my written judgment dated 16 October 2003; and
11. The deposit referred to in the CA order was the deposit made pursuant to O 17(1) Court of Appeal Rules 1994 and not the money. **I**

TIME FOR COMPLIANCE

[28] The respondent who appeared in person referred to my written judgment dated 16 October 2003, specifically para 2 of the applicant's prayer at pp 2 and 3 and

- A the order at p 16 thereof and submitted that ‘there can be no mistake that the time for compliance is within seven days of the service of the three orders’.

- [29] The applicant’s learned counsel Mr Abdul Majid Md Yusof relied on the approved sealed copy of the 2003 order and stressed that the time for respondent’s compliance is within seven days from the service of the 2003 order.
- B

- [30] It is essential for me to point out that pp 2 and 3 of my written judgment contain the prayers sought by the applicant under the heading ‘Application’ while ‘the Decision of the Court’ was spelt out at pp 9 to 16 thereof. The concluding paragraph at p 16 of my written judgment reads as follows:
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Having carefully considered the respective submissions and in the light of the foregoing grounds, I hold that there are merits in the garnishee’s application in enclosure (56). I therefore make an order in terms thereof.

- D [31] After delivery of my written judgment in the presence of all the learned counsel including the respondent who appeared for the judgment creditor, there was no expression of any misgivings or miscomprehension by the respondent in relation to the above pages of my written judgment.

- E [32] Subsequent procedural steps and actions taken by the respondent certainly confirmed their undoubted comprehension of the terms of my written judgment. By way of elaboration, pursuant to O 42 r 8(1), in response to the applicant’s solicitors submitting a copy of the draft order for approval by the respondent as judgment creditor’s solicitor, the respondent had returned it with his signed consent and approval without any amendment whatsoever. The draft order was thereafter approved by the registrar of this court on 5 November 2003 and duly sealed. More than two years had now elapsed without any qualms by the respondent in relation to the terms of my written judgment.
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- G [33] According to the Malaysian Legal Directory, the respondent has some 35 years of active legal practice having been admitted to the Malaysian Bar on 24 December 1971. He has appeared as learned counsel in this court in countless civil litigations, quite often as lead counsel upon being instructed by other learned juniors who appeared with him as his instructing solicitors.

- H [34] If at all the respondent had any misgivings or was unable to agree with the terms of the draft 2003 order, he would certainly have invoked O 42 r 8(3), so as to obtain an appointment before the registrar, by giving notice to the applicant’s solicitors, to settle the terms of the judgment or order. Had that been done by the respondent, the terms of the draft 2003 order would have been mandatorily settled by the registrar under O 42 r 8(4).
- I

[35] Alternatively, as the 2003 order was made by me, the respondent could have required the matter in dispute to be referred to me for my determination. However, as alluded to above, the respondent has returned the draft 2003 order with his signed

consent and approval without any amendment whatsoever. The respondent did nothing to indicate any dispute, dissatisfaction or disagreement vis-a-vis the terms of the draft 2003 order.

A

[36] The respondent has not filed any appeal against the 2003 order. There can be no doubt that at all material time, the respondent has approved the draft 2003 order which crystallized eventually as the sealed 2003 order in the terms as spelt out at p 16 of my written judgment, and that the parties are legally bound thereby.

B

[37] The relevant portion of the sealed 2003 order reads as follows:

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MAKA ADALAH DIPERINTAHKAN bahawa Tetuan Yau Jiok Hua & Company Peguamcara bagi Pemiutang Penghakiman hendaklah mematuhi Perintah Mahkamah Tinggi bertarikh 23 haribulan November, 1995 ('Perintah Penggantungan Perlaksanaan') dan Perintah Mahkamah Rayuan bertarikh 11 haribulan Mac, 2002 ('Perintah Mahkamah Rayuan') dengan membayar kepada Ganishi jumlah sebanyak RM309,133.45 yang dipegang oleh Tetuan Yau Jiok Hua & Company sebagai 'Stakeholder' atas Akujanji untuk memulangkan semula wang tersebut kepada Garnish! sekiranya Rayuan Garnishi berjaya di Mahkamah Rayuan Malaysia, dalam masa tujuh (7) hari dari tarikh penyampaian Perintah ini:

D

[My translation:

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IT IS HEREBY ORDERED that Messrs Yau Jiok Hua & Company Solicitor for the Judgment Creditor shall comply with the Order of the High Court dated 23 November 1995 ('the Order for Stay of Execution') and the Order of the Court of Appeal dated 11 March 2003 ('the Court of Appeal Order') by paying to the Garnishee a sum of RM309,133.45 held by Messrs Yau Jiok Hua & Company as stakeholder on the undertaking to refund the said sum to the Garnishee in the event that the Garnishee's Appeal is successful in the Court of Appeal Malaysia, within seven (7) days from the service of this Order.]

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[38] In the circumstances, I hold that the respondent's aforesaid submission is legally unsustainable.

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[39] I shall revert to the service of the three orders later in my judgment.

PENAL NOTICE

H

[40] The respondent contended that

- (1) there is no evidence before this court that the 2003 order has on it the indorsement of the penal notice in Form 87; and
- (2) For the stay order and the CA order, the applicant did not even take the trouble to apply for an order to allow the indorsement in Form 87.

I

[41] The response of the applicant is that the penal notice has been indorsed on the 2003 order.

A [42] In my judgment, the above submissions may be resolved by reference to the sealed copy of the 2003 order, the terms of which the respondent and the applicant's solicitors had approved without amendment.

B [43] Upon a proper perusal of the sealed 2003 order, it is my specific finding that it has been exhibited as SHA7 in encl (2) ie the affidavit affirmed by the applicant's in-house legal adviser. There is also an affidavit of service in encl (15) affirmed by the process server of the applicant's solicitors, affirming that he has on 24 February 2005 served on the respondent personally the motion in encl (10), the affidavit in support in encl (11), the affidavit in support of the ex parte application for leave in encl (2), including, inter alia, the sealed 2003 order and all these documents had been exhibited as LCB2. The 2003 order specifically contains the following indorsement:

C Jika kamu Tetuan Yau Jiok Hua & Company yang dinamakan di dalam ini, abai memathui perintah ini mengikut masa yang dihadkan dalamnya itu, kamu boleh dikenakan pelaksanaan bagi maksud memaksa kamu mematuhi.

D [My translation:

If you (the within-named) Messrs Yau Jiok Hua & Company neglect to obey this order by the time therein limited, you will be liable to process of execution for the purpose of compelling to obey the same.]

E [44] There can be no two views about the above indorsement which I hold as being in complete compliance with Form 87 para (a). The relevant portion of the sealed 2003 order as reproduced above provides the answer to the respondent's contention pertaining to the absence of the Form 87 indorsement in the stay order and the CA order. These two orders have been expressly included in the sealed 2003 order as an integral part thereof with which the respondent was required to comply in its entirety, and not as contended by the respondent.

PERSONAL SERVICE OF THE THREE ORDERS

G [45] The respondent relied on O 45 r 7(2) and (6) and *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1 (CA) to support his contention that:

1. the applicant has not served the three orders on him personally;
2. the applicant's solicitors' letter dated 27 December 2003 exhibited as SBA8 in encl (11) showed that the 2003 order was served on the respondent's firm Messrs Yau Jiok Hua & Co;
3. the affidavit of the applicant's solicitor Miss Adillah Ahmad Nordin in encl (17) relating to personal service of the three orders on him is of no evidential value as she was not the person who effected service thereof; and
4. the respondent's presence in court when the order for stay of execution was given does not relieve the applicant from complying with the requirement of personal service where the order is one requiring him to do an act.

I [46] On the other hand, it was argued for the applicant that the three orders have been served on the respondent personally.

[47] I shall consider this question as one of mixed fact and law.

A

[48] My perusal of para 11 of the applicant's affidavit in encl (11), affirmed by the applicant's in-house legal adviser in support of the motion, reveals that the applicant's solicitors Messrs Adillah Ahmad Nordin had vide letter dated 2 January 2003 by hand served a copy of the CA order on the respondent personally on 3 January 2003 and demanded the refund of the money. Exh. SBA4 is the said letter which was addressed to the respondent at his address for service enclosing therewith a certified true copy of the CA order by way of service on the respondent as solicitor for the judgment creditor. The said letter also referred to the letter dated 7 November 2002 from the applicant's solicitors to the respondent, enclosing the sealed copy of the stay order and requiring the respondent to refund the money within 14 days thereof to the applicant's solicitors, failing which the applicant's solicitors have strict instructions to make the necessary application to the High Court for an order compelling the respondent to comply therewith.

B

C

[49] Paragraph 19 of the said affidavit in encl (11) reveals that the applicant's solicitors Messrs Adillah Ahmad Nordin had vide letter by hand dated 27 December 2003 (exh SBA8) enclosed therewith a sealed copy of the 2003 order by way of service on the respondent at the same address for service, demanding the refund of the money within seven days thereof, failing which the applicant's solicitor's has strict instructions to proceed with an action against the respondent for recovery of the money.

D

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[50] The receipt of the letter exh. SBA4 has been acknowledged by the respondent on 3 January 2003 at 3.40pm with a manual signature and the rubber stamp of the respondent, complete with the respondent's address, telephone and facsimile numbers.

F

[51] Receipt of the exh. SBA8 has also been acknowledged by the respondent on 27 December 2003 at 9.55am with a manual signature and the rubber stamp of the respondent complete with the respondent's address, telephone and facsimile numbers.

G

[52] The averments of the applicant's in-house legal adviser were corroborated by Miss Adillah Ahmad Nordin the then learned counsel having conduct of the main suit and the matter herein, who had in para 4 of her affidavit in reply in encl (17) averred to the same effect.

H

[53] It is significant to state that in the very first sentence of the respondent's written submission, he has admitted and it cannot be otherwise that he is the respondent in this motion, ie Yau Jiok Hua (practising in the name and style of Messrs Yau Jiok Hua & Co).

I

[54] As the respondent's averments of non-service are in direct conflict with the applicant's averments of service, I find it instructive to adopt the safer approach which Chang Min Tat FJ (as he then was) has applied in the judgment delivered for

- A the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, ie by referring to and relying on the witness' (in this case the deponents') acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case, and that plausibility should never be mistaken for veracity.
- B [55] The above approach was applied by James Foong J (now JCA) in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332, at p 349E–H.
- C [56] In my view, the fact that the above approach was applied in relation to oral testimonies in a full trial does not make it any less applicable to the resolution of conflicting affidavits affirmed by deponents for the opposing parties herein.
- D [57] Reverting to the issue of service, it is my specific finding and there can be no doubt that the respondent's averments run counter to documentary exhibits. The respondent's affidavit in encl (16) showed that the applicant's cheque for the money sent with letter dated 3 January 1996 to the respondent's firm had been duly served on and accepted by the respondent. The three orders have been served on and acknowledged by the respondent as alluded to above. The respondent cannot be heard to say that while he has accepted the cheque for the money as having served on him, he has on the other hand not been served with the three orders.
- E [58] It is therefore plain and obvious that the three orders had in fact and in law been served on the respondent personally.
- F [59] *Capital Insurance Berhad* relied upon by the respondent, reveals facts which are clearly distinguishable from those before me. There, the motion dated 2 November 1995 sought an order that an advocate and solicitor (who was admitted to the Bar on 5 October 1964 and therefore has at that time 31 years of continuous active legal practice and now about 42 years standing) to prison for disobeying the order directing the advocate to forthwith refund all the monies which had been paid by the appellant's solicitors pending appeal. The only issue before the Court of Appeal was the advocate's alleged disobedience to the order to pay from 25 July 1995 to 14 October 1995 ('the period'). It was common ground that the order was not served during the period. However, the advocate had complied with the terms of the order by paying to the applicant's solicitors within 24 hours of the service of that order.
- G [60] It was against this factual background that Abu Mansor bin Ali JCA (later FCJ), who delivered the judgment of the Court of Appeal, held that the advocate there had not committed any contempt.
- H [60] I am of the view that the above judgment lends neither support nor credence to the respondent's contention herein as the facts are miles apart. In fact, while the advocate there did effect the refund within 24 hours of the service of the order, the respondent herein who is also an advocate did nothing about the refund, even until today. The respondent herein has never averred in any of his affidavits that, at all
- I

material time, the money was his for him to keep or for his own use or that he could pay the money to someone else, other than the applicant.

A

MOTION AND STATEMENT

[61] The respondent contended that the motion and the statement under O 52 r 2(2) did not contain information with sufficient particularity thereby rendering the charge against him defective and so the motion should be dismissed on the authority of *Syarikat Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112 (HC).

B

[62] The stand taken for the applicant is to the contrary.

C

[63] I shall now consider *Syarikat M Mohamed*. That case concerned a motion to commit the first and second defendants who were the partners of Syarikat Pal Bersaudara, to prison for contempt of court for 'breach of injunction'. The injunction contained numerous and different terms. The statement accompanying the motion did not contain sufficient information as to what the alleged breach was all about. KC Vohrah J (later JCA) held that the defendants were entitled to know what they had breached. Consequently, the motion was dismissed with costs.

D

[64] By contrast, the instant motion contains prayers for, inter alia, an order that the respondent, be committed to prison (until further order) on ground of contempt against the 2003 order wherein the respondent was required to comply with the stay order and the CA order by paying to the applicant the money held by the respondent as stakeholder upon the undertaking to refund the money to the applicant in the event the applicant's appeal succeeds in the Court of Appeal.

E

[65] Paragraph 4 of the statement under O 52 r 2(2) sets out the ground on which the committal is sought ie the respondent's failure to comply with the 2003 order whereby the respondent was required to comply with the stay order and the CA order by paying to the applicant the money held by the respondent as stakeholder on the undertaking to refund the money to the applicant in the event the applicant's appeal succeeds, within seven days thereof.

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[66] I entertain no doubt whatsoever that the motion and the statement have set out the contempt specifically alleged against the respondent and had specified, with sufficient particularity, the precise nature of the order with which the respondent has to comply, ie payment of the money by him to the applicant within the time frame stated therein, and that the respondent knew exactly what the alleged contempt was in order to enable him to meet the allegations against him and to prepare his defence.

H

[67] I am therefore unable to sustain the respondent's contention.

UNDERTAKING

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[68] In resisting this motion, the respondent submitted that the applicant had forfeited its right to the undertaking from him, by virtue of the applicant's late or delayed payment of the money to him as judgment creditor's solicitor.

A [69] The applicant stressed that the respondent is now raising issues which should have been raised at the hearing of the applicant's summons in chambers in encl (56).

B [70] In my view, if the respondent's submission is valid, then he should have rejected the payment of the cheque representing the money on ground of his allegation of the forfeiture of the applicant's right to his undertaking. However, the respondent had instead accepted the applicant's payment of the money with no qualms, reservation, qualification or condition whatsoever. The applicant's payment of the money to the respondent and the receipt thereof by the respondent cannot be effected as though it is for nothing. The respondent's deed and conduct in accepting the payment plainly and obviously demonstrates that he has at all material time been acutely aware and have full knowledge of the terms for which the money has been paid to him ie on the basis of his undertaking as stakeholder as so clearly stated in the stay order read with the CA order, and the 2003 order, which have led to the present committal proceedings.

D [71] The respondent's submission is in my view the product of an afterthought.

COURT OF APPEAL ORDER

E [72] The final issue raised by the respondent is that the CA order contains no direction directing him or his firm to do anything within the meaning of O 45 r 5.

F [73] It was submitted for the applicant that the CA order has clearly referred to the stay order and hence the refund of the money by the respondent to the applicant in the event the applicant's appeal succeeds.

G [74] In my judgment, it is to be noted that the CA order was sealed by the Court after the respondent has approved it. Since the inception of the main suit in 1992, the respondent has uninterrupted and unbroken conduct of the matter. The CA order was made pursuant to the applicant's appeal against the stay order as shown in the intitulement. The CA order had stated in clear and unambiguous terms that the applicant's appeal was allowed by the Court of Appeal. That being the case, the stay order, expressed in the minutes of Suriyadi J as reproduced above, would take effect forthwith ie the refund of the money by the respondent to the applicant. To contend otherwise, as has been done by the respondent, is a defiance of logic and the plain truth. These two orders must be read conjunctively, and not in isolation.

H [75] Again the respondent's contention herein collapses.

TECHNICALITIES

I [76] Apart from considering the respondent's aforesaid submissions on their merits, it is essential for me to stress that all the issues and points raised by the respondent are highly technical. Rules of court contain vehicles for the purposes of obtaining necessary prayers according to the rights and obligations of the parties under the law. These rules should not be rendered ineffective by highly technical objections.

[77] In *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 at p 5, where the issue raised for the defendant therein was highly technical in nature which has not occasioned a substantial miscarriage of justice, I invoked O 1A which came into force on 16 May 2002. Order 1A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein.

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[78] Under O 2 r 3, a court or judge shall not allow any preliminary objection by any party to any cause matter or proceedings only on the ground of non-compliance with any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice: see also *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 (FC); *Megnaway Enterprise Sdn Bhd v Soon Lian Hock* [2003] 5 CLJ 103 (HC); *Terrance Simon Marbeck v Kerajaan Malaysia* [2003] 6 CLJ 120 (HC); and *Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors* [2003] 6 MLJ 19.

C

D

[79] In *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321, the Court of Appeal speaking through Gopal Sri Ram JCA:

1. re-affirmed the observation of the same Court in *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329 that a rule of court, like any other provision, may be the subject of an abuse and that it is the function and duty of the courts to be ever vigilant against this;
2. re-established the decision in *Mokhtar bin Amin* in relation to the modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions as one of greater flexibility than that adopted heretofore; and
3. adopted the principle enunciated by Lord Woolf MR in *R v Immigration Tribunal Ex Parte Jeyanthan* [1999] 3 All ER 231 that non-compliance with procedural requirements should not be treated as invalidating an action, proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

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[80] More specifically in relation to technicalities raised in committal proceedings, the judgment of the English Court of Appeal in *Nicholls v Nicholls* [1997] 147 NLJ 61 is singularly relevant. The court there took the opportunity to review fully the previous authorities on this subject in the hope that it would be possible to provide greater clarity than existed at present as to the state of the law.

H

[81] The first ground stated in the above appeal to the Court of Appeal was: That the committal order dated 15 March 1996 in Form N79 failed to give proper details of the contempt found proved.”. Lord Woolf MR, in giving the judgment of the court, cited extensively from previous authorities and after carefully reviewing them, was disinclined to set aside committal orders on technical grounds. His Lordship held, *inter alia*:

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A [82] The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interest of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.

C [83] The above principles were applied by me in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 249, pp 253G–254B, when I rejected the respondent's contention based on procedural irregularities which did not affect the validity of the ex parte application or substantive motion (see also the judgment of Haidar J (later CJ (M) in *Classic One Video Distributors Sdn Bhd v Chanan Singh all Sher Singh* [1997] 5 MLJ 209 at p 216C-F applying the judicial pronouncement of Lord Woolf MR in *Nicholls*).

ENIGMAS

E [84] The payment by the applicant's solicitors and the receipt by the respondent of the money, of which the respondent or any other third party was not the owner, has never been disputed or doubted. It is abundantly clear to me that all the above issues and points raised by the respondent have engineered more enigmas that solution to the entire scenario. These enigmas include:

- F
1. What has happened to the money?
 2. Has the respondent effected payment thereof to the judgment creditor?
 3. If so, why did the respondent do it?
 4. Is the judgment creditor entitled to the money?
 5. If not, is the money still in the respondent's account?
 6. If the money is still in the respondent's account, what does the respondent propose to do with the money?
 7. Has the respondent ever attempted to refund the money to the applicant?

H

[85] Having carefully considered each and every issue and point raised by the respondent, I have found no answer to any of the above enigmas.

PROOF BEYOND REASONABLE DOUBT

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[86] It is trite law that in order to sustain a conviction for contempt of court, the standard of proof required of the applicant is to prove the case beyond reasonable doubt (see *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126; *Polygram Records Sdn Bhd v Phua Tai Eng* [1986] 2 MLJ 87; *Re Bramblevale Ltd* [1970] Ch

128; *Dean v Dean* [1978] 1 FLR 517; *A-G v Newspaper Publishing plc & Ors* [1988] Ch 333; *Wee Choo Keong v MBf Holdings Bhd & Anor* [1995] 3 MLJ 549, PC.)

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[87] On the foregoing grounds, I am satisfied beyond reasonable doubt that the applicant has proved that the respondent has openly and persistently disobeyed the 2003 order. I therefore find him guilty of contempt of court and record a conviction against him.

B

SENTENCE

[88] In mitigation, the respondent who is now a contemnor tendered his apologies for having committed the contempt, adding that he had paid the money to the judgment creditor, as a result of which he is no longer able to repay the same to the applicant, but he left it to the court to deal with the sentence and prayed for leniency.

C

[89] It was submitted for the applicant that the amount said to be paid by the contemnor to the judgment creditor does not tally with the money, but he left the sentence to the court.

D

[90] In my judgment, it needs to be observed that art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 confer upon our Federal Court, Court of Appeal and High Courts, the jurisdiction to punish any contempt of itself. Our superior courts have theoretically unlimited jurisdiction to mete out any sentence for contempt of court. I shall now consider the various options in order to determine the suitability and propriety of the specific sentence to be meted out in the instant case.

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IMPRISONMENT

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[91] Although our courts have plenary powers to impose a custodial sentence by way of imprisonment as a major sanction in a case of civil contempt such as the instant case, I am of the considered view that a custodial sentence is to be imposed only in the most serious cases. The seriousness will be judged by reference to the unrelenting interference with administration of justice and the unmitigated culpability of the offender, with the latter perhaps being the key factor (see *R v Thomson Newspapers Ltd & Ors* [1968] 1 All ER 268 at p 270 and *The Law of Contempt* (3rd Ed, 1996) by Nigel Lowe and Brenda Surfin at p 527).

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H

[92] I do not propose to impose a custodial sentence in the instant case as it is not one of the most serious cases of contempt of court.

FINE

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[93] Under art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964, there is no statutory limit to the imposition of a fine. The culpability of the respondent here clearly calls for the imposition of a substantial fine. The penal element in enforcing a court order was emphasized by Cross J in *Phonographic*

- A** *Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195 at pp 198–199 (also approving the statement in 8 *Halsbury's Laws of England* (3rd Ed) 20) as follows:
- Where there has been wilful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt ... 'bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest.' Civil contempt bears much the same character as criminal contempt.
- B**
- C** [94] In assessing the appropriate fine, I must take into account the damage done to public interest, in addition to the seriousness of the contempt (see Megaw P in *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 2 All ER 849 at p 862; and my judgment in *Chung Onn v Wee Tian Peng* [1996] 5 MLJ 521 at pp 525 and 526).
- D** [95] As a general rule, the process of sentencing is an exercise of judicial discretion based on the facts and circumstances prevailing in each particular case and having regard to established judicial principles.
- E** [96] In considering a fair and just sentence herein, I have taken the following factors into account:
- F**
- G**
- H**
- I**
1. The standing of the contemnor as an advocate and solicitor for some 35 years;
 2. The money belongs to the applicant whose revenue comes in the form of assessments and rates collected from the residents within the territorial jurisdiction of the applicant;
 3. The money has been paid to the contemnor for more than 10 years and orders, notices, reminders and other documents demanding repayment of the money by the contemnor to the applicant's solicitor drew a complete blank from the contemnor;
 4. The contemnor's persistent and open disobedience to the three orders, one of which was made by the Court of Appeal;
 5. The age of the contemnor, who is more than 60 years of age;
 6. The administration of justice, dignity of the court and obedience of court orders so as to avoid anarchy;
 7. The contemnor's plea for leniency; and
 8. The amount of the money involved.
- [97] I therefore impose a fine of RM75,000 or 100 days in default.
- [98] As the contempt is of a continuous nature, and so long as the contempt has not been purged by the contemnor, it continues unabated everyday. For that, I impose a daily fine of RM750, to be paid from day to day, until the contemnor purges the contempt, ie by paying the money to the applicant pursuant to the 2003 order. For the daily fine, I impose a day's imprisonment in default thereof.

[99] The contemnor has paid the fine of RM75,000 in addition to the daily fine of RM750 for six days amounting to RM4,500 until 24 January 2006, when he purged the contempt by paying the money to the applicant.

Order accordingly.

Reported by Sally Kee

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